

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

STEPHEN W. LONG and CARI ANN LONG, )  
 Plaintiffs, )  
 v. )  
 NATIONAL DEFAULT SERVICING )  
 CORPORATION, an Arizona corporation, )  
 Defendant. )

3:09-cv-77-RCJ-VPC

**ORDER**

Currently before the Court is a Motion for Partial Summary Judgment (#37) filed by Plaintiffs Stephen W. Long and Cari Ann Long (collectively referred to herein as "Plaintiffs") on December 7, 2009. Defendant National Default Servicing Corporation ("National Default") filed an Opposition (#57) on May 3, 2010, and Plaintiffs filed a Reply (#58) on May 10, 2010.

The Court heard oral argument on the matter on August 2, 2010.

**BACKGROUND**

This case involves a claim for violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. ("FDCPA").

On January 12, 2006, Plaintiffs executed a note secured by a deed of trust on a piece of property located at 6617 Eastridge Drive, Reno, Nevada. The lender on the deed of trust was First Horizon Home Loan Corporation ("First Horizon"). The trustee was Ticor Title.

On June 1, 2008, Plaintiffs defaulted on their mortgage payments. On September 15, 2008, a notice of default and election to sell was filed in the Washoe County Recorder's office by Chicago Default Services. Chicago Default Services was acting as an agent for National

1 Default which, in turn, was acting as an agent for America's Servicing Corporation. According  
2 to the Complaint, America's Servicing Corporation is a fictitious name registered and used by  
3 Wells Fargo Home Mortgage, Inc. ("Wells Fargo").

4 On December 22, 2008, First Horizon executed a corporate assignment of the deed of  
5 trust to U.S. Bank National Association ("U.S. Bank"). The assignment was filed with the  
6 Washoe County Recorder's office on January 7, 2009. On December 29, 2008, U.S. Bank  
7 executed a substitution of trustee naming National Default as the trustee in place of Ticor  
8 Title. This substitution was filed on January 7, 2009. In addition, on January 7, 2009,  
9 National Default filed a notice of trustee's sale in the Washoe County Recorder's office.  
10 During this time, Plaintiffs failed to make any mortgage payments or to cure their default.

11 On February 9, 2009, a trustee's deed upon sale was recorded listing U.S. Bank as the  
12 owner of the property. On February 11, 2009, Plaintiffs filed the present lawsuit. Now before  
13 the Court is Plaintiffs' motion for partial summary judgment against National Default.  
14 According to Plaintiffs, National Default is liable for violating the FDCPA because it is a debt  
15 collector under that act and failed to provide notice allegedly required by the FDCPA during  
16 the foreclosure proceedings on the subject property.

### 17 DISCUSSION

18 Summary judgment "should be rendered if the pleadings, the discovery and disclosure  
19 materials on file, and any affidavits show that there is no genuine issue as to any material fact  
20 and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2).  
21 A material issue of fact is one that affects the outcome of the litigation and requires a trial to  
22 resolve the differing versions of the truth. Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d  
23 1472, 1483 (9th Cir. 1986). The burden of demonstrating the absence of a genuine issue of  
24 material fact lies with the moving party, and for this purpose, the material lodged by the  
25 moving party must be viewed in the light most favorable to the nonmoving party. Adickes v.  
26 S.H. Kress & Co., 398 U.S. 144, 157 (1970); Martinez v. City of Los Angeles, 141 F.3d 1373,  
27 1378 (9th Cir. 1998).

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Any dispute regarding a material issue of fact must be genuine—the evidence must be such that “a reasonable jury could return a verdict for the nonmoving party.” Id. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial’” and summary judgment is proper. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). “A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation.” British Airways Board v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978). The evidence must be significantly probative, and cannot be merely colorable. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). Conclusory allegations that are unsupported by factual data cannot defeat a motion for summary judgment. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

In their motion for partial summary judgment against National Default, Plaintiffs are seeking a judgment that National Default is a debt collector under the FDCPA and that National Default violated the FDCPA by failing to send the notices required by 15 U.S.C. § 1692g(a)(1)-(5).<sup>1</sup> (Motion for Partial Summary Judgment (#37) at 1-2). According to Plaintiff, National Default is subject to the FDCPA because it is a “debt collector” under that act. Plaintiffs allege that National Default qualifies as a debt collector because “two of its officers are lawyers who regularly engage in collection activities,” and “the Notice of Default contains a statement that a specific amount of money is past due.” Id. at 3. In addition, Plaintiffs assert that National Default violated the FDCPA by failing to provide Plaintiffs with the notices mandated by 15 U.S.C. § 1692g(a)(1)-(5) in its initial communication with

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<sup>1</sup> 15 U.S.C. § 1692g(a) provides that within “five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication” send the consumer a written notice containing (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt is disputed, the debt collector will obtain verification of the debt and mail such verification to the consumer; and (5) a statement that, upon the consumer’s written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor. 15 U.S.C. § 1692g(a)(1)-(5).

1 Plaintiffs. Id. at 7. As a result of this alleged violation, Plaintiffs seek an order finding that  
2 National Default violated the FDCPA, and request that the matter proceed to trial in order to  
3 ascertain the statutory damages, actual damages and a reasonable attorney's fee. Id. at 10.

4 In response, National Default argues that Plaintiffs have failed to show that it is a debt  
5 collector as defined by the FDCPA. (Opposition to Motion for Partial Summary Judgment  
6 (#57) at 5). According to National Default, Plaintiffs improperly rely on the conduct of two of  
7 National Default's officers to impute the status of debt collector on National Default.  
8 Specifically, National Default states that Plaintiffs improperly allege that National Default  
9 qualifies as a debt collector because two of its officers are attorneys who work in a private law  
10 firm that handle default loans for lenders, foreclosure proceedings, bankruptcy proceedings,  
11 work outs and receiverships. Id. at 5. National Default states that Plaintiffs "have made quite  
12 a leap from two individuals allegedly acting as attorneys in a firm that sometimes handles  
13 defaulted loans for lenders to the ultimate legal conclusion that [National Default] is a debt  
14 collector as defined by the FDCPA." Id. at 6. Notably, National Default states that neither of  
15 the two attorney officers are parties to this lawsuit and further that their actions are not  
16 implicated in this matter.

17 In addition, National Default argues that it was not involved in the process of "debt  
18 collection" as that term is defined in the FDCPA. National Default argues that "[b]y serving  
19 and recording the notice of default and notice of sale, [National Default] did not demand that  
20 Plaintiffs make any payment to reinstate their loan. Instead [National Default] acted merely  
21 to enforce a security instrument, and such conduct does not constitute debt collection." Id.  
22 at 8. Because National Default was engaged in a non-judicial foreclosure on Plaintiffs'  
23 property, National Default argues that the FDCPA does not apply.

24 Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt  
25 collectors, to insure that those debt collectors who refrain from using abusive debt collection  
26 practices are not competitively disadvantaged, and to promote consistent State action to  
27 protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). In furtherance of  
28 this purpose, the FDCPA requires and prohibits certain activities by debt collectors that are

1 done “in connection with the collection of any debt.” 15 U.S.C. §§ 1692c (prohibiting certain  
2 communications), 1692d (prohibiting harassment or abuse), 1692e (prohibiting false or  
3 misleading representations), 1692f (prohibiting unfair practices), 1692g (requiring validation  
4 of debts). The FDCPA subjects a debt collector to civil liability for failure to comply with any  
5 of its provisions. See 15 U.S.C. 1692k(a).

6 The prohibitions of the FDCPA apply only to “debt collectors.” Under the FDCPA, a  
7 debt collector is defined as any person who uses “any instrumentality of interstate commerce  
8 or the mails in any business the principal purpose of which is the collection of any debts, or  
9 who regularly collects or attempts to collect, directly or indirectly, debts owed or due or  
10 asserted to be owed or due another.” 16 U.S.C. § 1692a(6). “For the purpose of section  
11 1692f(6) of this title, such term also includes any person who uses any instrumentality of  
12 interstate commerce or the mails in any business the principal purpose of which is the  
13 enforcement of security interests.” Id. Section 1692f(6), referenced in this definition, prohibits  
14 a debt collector from taking or threatening to take “nonjudicial action to effect dispossession  
15 or disablement of property” if there is no present right to possession of the property claimed  
16 as collateral through an enforceable security interest, if there is no present intention to take  
17 possession of the property, or if the property is exempt by law from such dispossession or  
18 disablement. 15 U.S.C. § 1692f(6).

19 Under the cited definition, a person whose principal purpose is the enforcement of  
20 security interests is a “debt collector” for the purpose of section 1692f(6) only; the person is  
21 not subject to the rest of the FDCPA unless the person also fits section 1692a(6)’s general  
22 definition of a debt collector. Kaltenbach v. Richards, 464 F.3d 524, 527 (5th Cir.  
23 2006)(recognizing “distinction between general debt collection and enforcement of a security  
24 interest,” and observing that “[b]y the plain language of [section 1692a(6)], . . . a person  
25 whose business has the principal purpose of enforcing security interests but who does not  
26 otherwise satisfy the definition of a debt collector is subject only to section 1692f(6)); see  
27 also Fouché v. Shapiro & Massey, 575 F.Supp.2d 776, 783 (S.D. Miss. 2008); Gray v. Four  
28 Oak Court, 580 F.Supp.2d 883, 887 (D.Minn. 2008)(stating that the FDCPA’s definition of

1 “debt collector” clearly reflects Congress’s intent to distinguish between “the collection of any  
2 debts” and “the enforcement of security interests”).

3 In this case, in order to be liable for violating the provisions of 15 U.S.C. § 1692g(a)(1)-  
4 (5), National Default must qualify as a “debt collector” under the general debt collector  
5 provision of the FDCPA because section 1692g does not apply to a debt collector engaged  
6 only in the enforcement of security interests. However, Plaintiffs have failed to either assert  
7 or establish that the “principal purpose” of National Default’s business “is the collection of any  
8 debts,” rather than the enforcement of security interests.

9 In this matter, the Court finds that National Default does not fall within the general  
10 provisions of the definition of a debt collector. As noted in the foregoing, Plaintiffs assert that  
11 National Default is a “debt collector” because the Notice of Default filed against their property  
12 stated that a specific amount of money was past due, and also because two officers of  
13 National Default are attorneys whose law firm practices in the area of bankruptcy and  
14 foreclosure. Plaintiffs have provided no other evidence of National Default’s security  
15 enforcement or debt collection practices. The only evidence provided by Plaintiffs indicates  
16 that National Default was substituted as the trustee on their deed of trust and participated in  
17 the non-judicial foreclosure on Plaintiffs’ property. This evidence supports a claim that  
18 National Default was a debt collector engaged in the “enforcement of security interests” and  
19 thus only subject to the requirements of 15 U.S.C. §1692f(6) under the FDCPA. Because the  
20 evidence fails to show that National Default’s principal purpose was the “collection of any  
21 debts” the Court cannot grant Plaintiffs’ request for summary judgment on this issue.<sup>2</sup>  
22 Moreover, in light of the foregoing, the FDCPA claim asserted against National Default is  
23 dismissed. Plaintiffs have failed to assert a claim upon which relief can be granted that  
24 National Default violated the provisions of the FDCPA by participating in a non-judicial  
25 foreclosure on Plaintiffs’ property.

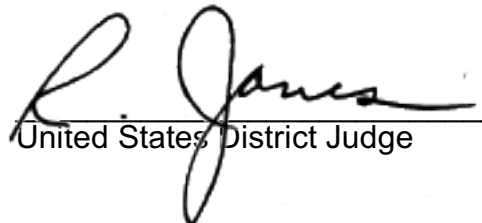
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27 <sup>2</sup> In addition, the Court notes that this case involves a non-judicial foreclosure proceeding which  
28 is governed by Nevada law. NRS § 107.080 provides the notice requirements that must be followed for  
a non-judicial foreclosure sale to be valid. That statute does not reference the FDCPA or require that  
a beneficiary or trustee engaged in foreclosure follow the requirements of the FDCPA.

**CONCLUSION**

For the foregoing reasons, IT IS ORDERED that Plaintiffs' Motion for Partial Summary Judgment (#37) is DENIED. IT IS FURTHER ORDERED that the FDCPA claim asserted against National Default is dismissed.

DATED: This 11<sup>th</sup> day of August, 2010.

  
United States District Judge